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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. —

GEORGE K. ROSENBERG, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, LOS ANGELES, CALIFORNIA, PETITIONER

v.

GEORGE FLEUTI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the petitioner, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit (R. 43),[1] reversing the order of a special

[1] "R." refers to the printed record in the court of appeals, to which has been appended, consecutively paginated, the transcript of the proceedings in that court. "Tr." refers to the transcript of respondent's deportation hearing; it is contained in the authenticated record of the deportation proceedings, which was received in evidence in the district court as "Exhibit A" to the motion by the Immigration and Naturalization Service for summary judgment (R. 18–19). The exhibit is being lodged herewith with the Clerk of this Court. "Ex." followed by a number refers to the numbered exhibits which were received in evidence at the deportation hearing. These are also contained in "Exhibit A".

inquiry officer of the Immigration and Naturalization Service directing respondent's deportation, pursuant to Section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1), as an alien who was excludable by law at the time of his entry (Appendix C, *infra*, p. 47).

OPINIONS BELOW

The opinion of the court of appeals (R. 32–42; Appendix A, *infra*, pp. 20–32) has not yet been reported. The opinion of the district court (R. 19–21) is not reported. The opinion of the Board of Immigration Appeals appears in Appendix B, *infra*, pp. 33–38. The opinion, findings of fact, conclusions of law, and order of the special inquiry officer of the Immigration and Naturalization Service appear in Appendix C, *infra*, pp. 39–47.

JURISDICTION

The judgment of the court of appeals was entered April 17, 1962 (R. 43). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the provision of the Immigration and Nationality Act excluding from admission into the United States aliens "afflicted with psychopathic personality" is void for vagueness as applied to a homosexual, even though it appears that Congress used the statutory term with the purpose of covering sexual deviates.

STATUTES INVOLVED

Section 212(a)(4) of the Immigration and Nationality Act, 66 Stat. 182, 8 U.S.C. 1182(a)(4), provides in pertinent part:

> SEC. 212. (a) Except as otherwise provided in this Act, the following classes of aliens * * * shall be excluded from admission into the United States:
>
> * * * * * *
>
> (4) Aliens afflicted with psychopathic personality * * *;
>
> * * * * * *

Section 241(a)(1) of the same Act, 66 Stat. 204, 8 U.S.C. 1251(a)(1), provides in pertinent part:

> SEC. 241. (a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—
>
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;
>
> * * * * * *

STATEMENT

Respondent is a 50-year-old alien, a native and citizen of Switzerland (R. 4, 14). He is unmarried and without dependents (Ex. 6). He was admitted to the United States for permanent residence on October 9, 1952, and has been here continuously since that time, except for a brief visit to Ensenada, Mexico, in August 1956, after which he was readmitted to the United States at San Ysidro, California, as a returning resident (R. 14, 20).

On August 27, 1953, he was convicted in the Municipal Court of Los Angeles of being a lewd and dissolute person, in violation of Section 647(5) of the California Penal Code (Ex. 7). On March 9, 1956, he was convicted on his plea of guilty in the Los Angeles Superior Court for having committed a homosexual act on February 16, 1956, in violation of Section 288a of the California Penal Code (R. 20; Ex. 2). In 1958, following his return from Mexico, he was arrested on suspicion of a similar offense in Oxnard, California, but the charges were dismissed (Tr. 10–11; Ex. 6).

In a sworn statement before an investigator of the Immigration and Naturalization Service on March 25, 1959, respondent acknowledged that he had had the urge to commit homosexual acts since he was about 24 years old and that he had indulged in such acts with other men in the intervening 22 years whenever the opportunity presented itself, usually about once a month. These activities started while he was living in Switzerland and continued after he came to the United States. His two convictions in Los Angeles were based on homosexual acts. (Ex. 6.)

On April 7, 1959, an order was issued requiring respondent to show cause why he was not deportable under Section 241(a)(1) of the Immigration and Nationality Act, *supra*, as an alien who was ineligible to enter the United States at the time of his August 1956 reentry,[2] on the ground that he had been

[2] This reentry constituted an "entry" into the United States within the meaning of the immigration laws. Immigration and Nationality Act, § 101(a)(13), 66 Stat. 167, 8 U.S.C. 1101(a)(13). See *infra*, pp. 10–12.

convicted of a crime involving moral turpitude and hence was inadmissible under Section 212(a)(9) of the Act, 8 U.S.C. 1182(a)(9) (Ex. 1). The conviction specified was that of March 9, 1956, for violation of Section 288a of the California Penal Code (*ibid.*). Hearings were held before a special inquiry officer of the Service, at which respondent was represented by counsel (Tr. 4–13). Respondent admitted the truth of the factual allegations charged in the order to show cause, conceded deportability, and was ordered deported on April 20, 1959 (Tr. 5–7, 13). He took no appeal. That order, however, is concededly invalid[3] and is not involved in these proceedings.

On June 18, 1959, respondent was examined by Dr. Arthur R. Dahlgren, a Senior Surgeon of the United States Public Health Service, who issued a certificate that he was afflicted with "Class A Psychopathic personality" and that this condition existed prior to and at the time of his entry in August 1956 (Ex. 5). On July 22, 1959, on motion of the Service's prosecuting officer, the deportation proceedings were ordered reopened by the special inquiry officer, and further hearings were held (Tr. 15). At the reopened hearing, an additional charge of deportability was lodged, *viz.*, that at the time of his entry in August 1956 he was inadmissible under Section 212(a)(4) of the Act, *supra,* as an alien who was afflicted with psychopathic personality (Tr. 16; Ex. 4). Respondent was served with a statement of the factual allegations underlying this charge, reciting that he had been examined and certified by the Public Health Service

[3] See note 4, *infra*, pp. 7–8.

as being afflicted with "Class A Psychopathic Personality"; that this condition existed prior to and at the time of his August 1956 entry; that for the past 22 years he had been afflicted with the desire for sexual relations with members of his own sex; and that during those years he had indulged in such relations at periodic intervals averaging approximately once a month (*ibid.*). Respondent acknowledged that he had been so certified (Tr. 17–18), and the Public Health Service certificate was received in evidence (Ex. 5, Tr. 18). Also received in evidence was respondent's sworn statement of March 25, 1959, in which he acknowledged his homosexual activities for the past 22 years (Ex. 6, Tr. 20). Respondent conceded at the hearing that he had testified truthfully when he made that statement (Tr. 18–19). Also introduced was the record of respondent's Los Angeles conviction in 1953, which he admitted related to him (Ex. 7, Tr. 20).

At a continued hearing there was received in evidence a report by respondent's psychiatrist, Dr. David R. M. Harvey, based on his examination of respondent on four occasions in May, June, July and August, 1959 (R. 6–8; Ex. 8, Tr. 25). The report acknowledged that respondent had had homosexual experiences since the age of 26 but stated that his "sexual drive—particularly at his age—is thought to be within his range of control, especially if he is under the supervision of continuing contact with a psychiatrist" (R. 7). The report concluded that respondent's deviation was "not sufficient to justify the diagnosis of psychopathic personality"; that the "formal label would be that of:

Sexual deviation, homosexuality, now under control" (R. 8).

Dr. Dahlgren, the Public Health Service Surgeon, appeared and testified that, on the basis of his examination of respondent and his history, he had concluded that respondent was a sexual deviate and that he had classified him as a psychopathic personality because the Manual of the Public Health Service governing the examination of aliens requires that sexual deviates be placed in this category (Tr. 26–29). Agreeing that a standard medical definition of "psychopathic personality" would specify that it be a constitutional disorder, *i.e.*, one due to hereditary or congenital conditions, Dr. Dahlgren stated that he had "no strong feeling" as to whether, according to "traditional medical terms", respondent would be considered a psychopathic personality (Tr. 31–32). Since respondent was beyond question a sexual deviate, he said, and since the instructions of the Public Health Service require that such persons be classified as psychopathic personalities, he had to use this terminology (Tr. 31–33).

In an opinion dated September 22, 1959, the special inquiry officer, while concluding that the deportation charge contained in the original order to show cause was not sustainable,[4] determined that respondent

[4] The officer noted that respondent's March 9, 1956 conviction, on which the original charge of deportability was based, was for "a misdemeanor classifiable as a petty offense" as defined in Section 4 of the Act of September 3, 1954, 68 Stat. 1145, and hence, under that section, was not a ground for mandatory exclusion. (Section 4 of the 1954 Act, now incorporated in

was nevertheless deportable on the subsequently lodged charge that at the time of his August 1956 entry he was excludable under Section 212(a)(4), *supra*, as an alien afflicted with psychopathic personality. Deportation was accordingly ordered on the latter charge (Appendix C, *infra*, pp. 39–47).

Respondent appealed to the Board of Immigration Appeals, which, on November 20, 1959, sustained the deportation order and dismissed the appeal (Appendix B, *infra*, pp. 33–38). On December 9, 1959, he commenced this action against the Service's Los Angeles District Director in the United States District Court for the Southern District of California, seeking declaratory and injunctive relief (R. 3–6, 10). The complaint charged that the deportation order was invalid because it was not based on reasonable, substantial and probative evidence (R. 5). The government filed an answer and motion for summary judgment, supported by the administrative record (R. 10–13, 18–19). In opposing summary judgment, respondent advanced the additional contention that the term "psychopathic personality" in Section 212(a)(4) is "so vague and indefinite as to render the statute invalid and unconstitutional" (R. 20–21). The matter was heard by a

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Section 212(a)(9) of the Immigration and Nationality Act, provides that an alien who is excludable because of conviction of "a misdemeanor classifiable as a petty offense under [18 U.S.C. 1(3)] by reason of the punishment actually imposed" may be admitted to the United States if he has committed not more than one such offense and if he is otherwise admissible. The punishment "actually imposed" on respondent for his March 9, 1956 conviction—a $200 fine (Ex. 2)—brought the offense within the 18 U.S.C. 1(3) definition of a petty offense.)

single district court judge, who, on January 4, 1961, granted the government's motion for summary judgment (R. 19–21). The court noted the legislative history of Section 212(a)(4), which clearly shows the intent of Congress that sexual deviates be classified by the enforcing authorities as psychopathic personalities,[5] and found the evidence sufficient to support the administrative finding that respondent was a sexual deviate at the time of the 1956 entry (R. 20–21). The court rejected the contention based on the alleged vagueness of the term "psychopathic personality", observing that, while it might be true that a criminal statute employing such a term would be stricken for indefiniteness, the same strict standard should not be required of a statute defining aliens who are to be excluded from the United States (R. 21).

On April 17, 1962, the Court of Appeals for the Ninth Circuit set aside the deportation order (R. 43). In its opinion (Appendix A, *infra*, pp. 20–32), it held the term "psychopathic personality" void for vagueness as applied to respondent, refusing to look to the legislative history of the statutory language in order to determine its meaning.

REASONS FOR GRANTING THE WRIT

In holding Section 212(a)(4) of the Immigration and Nationality Act, declaring aliens "afflicted with psychopathic personality" to be ineligible for admission to this country, void for vagueness as applied in the circumstances of this case, the court of appeals has

[5] See, as to the legislative history, note 6, *infra*, pp. 12–13.

decided an important question of federal law which has not been, but should be, settled by this Court. The decision, which is in conflict with the decision of another court of appeals on the same matter (*Quiroz* v. *Neelly*, 291 F. 2d 906 (C.A. 5); see *infra*, p. 18), is erroneous, we believe, in that it applies a familiar constitutional rule based on due process considerations—that statutes designed to govern conduct must give fair notice of the kind of action intended to be proscribed—to a situation where Congress is not seeking to regulate conduct but to prescribe standards for admission to the United States.

1. Congress has plenary authority to make rules and regulations for the admission of aliens and to establish categories of aliens who shall be excluded or deported, either absolutely or on such conditions as it may prescribe. *The Chinese Exclusion Case*, 130 U.S. 581; *Fong Yue Ting* v. *United States*, 149 U.S. 698; *Knauff* v. *Shaughnessy*, 338 U.S. 537; *Carlson* v. *Landon*, 342 U.S. 524; *Harisiades* v. *Shaughnessy*, 342 U.S. 580. Indeed, this Court has held Congress may even legislate retroactively in this field, decreeing deportation for past conduct which was not a ground for deportation when it occurred. *Harisiades* v. *Shaughnessy*, 342 U.S. 580; *Galvan* v. *Press*, 347 U.S. 522; *Marcello* v. *Bonds*, 349 U.S. 302; *Lehmann* v. *Carson*, 353 U.S. 685.

One of the classes of aliens whose deportation Congress requires consists of aliens who were excludable by law at the time of their entry. It is immaterial that the entry involved is a reentry. "Entry" is a term of art in immigration law and includes "any

coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one." *United States ex rel. Volpe v. Smith*, 289 U.S. 422, 425. This concept has been substantially adopted in the 1952 Act's definition of "entry" as meaning (§101(a)(13), 66 Stat. 167, 8 U.S.C. 1101(a)(13)):

> any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: *Provided*, That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception.

Thus, unless Congress has otherwise provided, an alien seeking reentry must meet all conditions of admission specified by Congress for initial entrants and if he falls within any of the inadmissible classes he must be excluded. By the same token, if, following reentry, it is found that at the time of reentry he was within one of the inadmissible classes, his deportation is required by Section 241(a)(1) (*supra*, p. 3). Apart from alienage, which is not questioned

here, the sole issue presented in such a situation is whether the alien was excludable by then existing law.

In this case, the special inquiry officer found from the evidence that respondent was a sexual deviate at the time of his entry in August 1956 and was therefore inadmissible under Section 212(a)(4) as one "afflicted with psychopathic personality." The legislative history of the quoted phrase shows clearly that Congress intended to include all sexual deviates, including homosexuals, in this category.[6] In reject-

[6] The pertinent legislative history is cited in footnote 2 of Judge Frank's concurring opinion in *United States* v. *Flores-Rodriguez*, 237 F. 2d 405, 412–413 (C.A. 2), to which reference was made by the district court in this case (R. 21). Since the court of appeals not only does not question the conclusion that the legislative history shows that Congress intended sexual deviates to be classified as psychopathic personalities, but apparently concurs in this view (see Appendix A, *infra*, pp. 23–24, including n. 4), there is no need at this time to trace the pertinent history in detail. See, in particular, S. Rep. 1515, 81st Cong., 2d sess., p. 345; H. Rep. 1365, 82d Cong., 2d sess., pp. 46–47; S. Rep. 1137, 82d Cong., 2d sess., p. 9. The last-cited report stated: "Existing law does not specifically provide for the exclusion of homosexuals and sex perverts. The provisions of S. 716 which specifically excluded homosexuals and sex perverts as a separate excludable class does not appear in the instant bill. The Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect which appears in the instant bill is sufficiently broad to provide for the exclusion of homosexuals and sex perverts. *This change of nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sex . . deviates.*" [Emphasis added.]

In view of the unambiguous legislative history, the courts which have considered the question have had no difficulty in concluding that aliens "afflicted with psychopathic personality", as the term is used in Section 212(a)(4), includes aliens who

ing respondent's claim that the phrase is void for vagueness, the district court relied on its legislative history (R. 21). The court of appeals held, however, that the phrase is unconstitutionally vague and that greater certainty cannot be supplied by consulting the legislative materials to ascertain the congressional purpose (Appendix A, *infra*, pp. 24, 28). We believe this was error.

The void-for-vagueness principle, upon which the court of appeals relied, was articulated by this Court in *United States* v. *Harriss*, 347 U.S. 612, 617, as follows:

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

Although the rule has found its commonest application in cases involving criminal statutes, it has also been applied to statutes imposing civil sanctions. See, *e.g.*, *Small Company* v. *American Sugar Refining Company*, 267 U.S. 233, 239. Since the point of the rule is that a person is entitled to know, before he acts, just what actions are forbidden, it follows that if the statute on its face is too vague to give him

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are homosexuals. See *Quiroz* v. *Neelly*, 291 F. 2d 906 (C.A. 5); *United States* v. *Flores-Rodriquez*, 237 F. 2d 405, 412–416 (C.A. 2; concurring opinion); *Ganduxe y Marino* v. *Murff*, 183 F. Supp. 565 (S.D. N.Y.), affirmed *sub nom. Ganduxe y Marino* v. *Esperdy*, 278 F. 2d 330 (C.A. 2), certiorari denied, 364 U.S. 824.

notice, the deficiency cannot be supplied by the gloss of court decisions construing the statute after he has acted. *Smith* v. *Cahoon* 283 U.S. 553, 563–565; *Lanzetta* v. *New Jersey*, 306 U.S. 451, 455–456.[1] The court of appeals here went further and held that even antecedent materials, such as legislative history, cannot be used to clarify the terms of an otherwise vague statute. This conclusion seems open to question. This Court has considered the prior construction of a state statute by the highest court of the state as fixing its meaning when it was attacked as void for vagueness. See, *e.g.*, *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 573–574. If the gloss of prior judicial construction can be used to lend certainty to an otherwise insufficiently definite statute, so as to put on notice an individual who has not yet acted, it would seem that the statute's legislative history might serve that purpose. Cf. *Screws* v. *United States*, 325 U.S. 91, where the legislative history of a criminal statute was considered in construing it narrowly so as to obviate the charge that it was unconstitutionally vague.

But even assuming the court of appeals is correct in its view that resort may never be had to legislative history to supply definiteness to a statute whose function is to give warning, that rule does not govern this case. For the statutory provision here involved is not designed to furnish advance notice. Nor is it required to do so. An alien whom the government seeks

[1] But see *Winters* v. *New York*, 333 U.S. 507, 514–515: "We assume that the defendant, at the time he acted, was chargeable with knowledge of the scope of subsequent interpretation."

to deport is of course entitled, as a matter of procedural due process, to notice of the charges he must face at the deportation hearing. But it does not follow that, before he can become liable to deportation, Congress must first warn him of the classes which are deportable so that he may guide himself accordingly. As we have seen, Congress may enact grounds of deportation retroactively, and thereby render an alien deportable for past conduct which did not entail deportability when it occurred. *Harisiades* v. *Shaughnessy; Galvan* v. *Press; Marcello* v. *Bonds; Lehmann* v. *Carson* (cited *supra*, p. 10).

Although no deportation or exclusion provision has heretofore been set aside on grounds of vagueness, this Court, in *Jordan* v. *De George*, 341 U.S. 223, 231–232, examined a deportation enactment to determine whether it met the constitutional test of definiteness. There, however, the provision was one in which deportability depended upon post-entry conduct.* Where liability to deportation is thus made to depend upon the alien's future behavior, the statutory enactment can indeed be a guide to his conduct, and there is reason to apply the void-for-vagueness principle.

Here, however, the statutory ground for expulsion is not the alien's conduct after entry, but his condition at the time of entry. Congress has undoubted power to exclude aliens applying for admission whom

*The provision required the deportation of aliens who were sentenced more than once to imprisonment for one year or longer because of conviction in this country of "any crime involving moral turpitude" committed after entry (341 U.S. at 225).

it deems undesirable because of some mental or physical condition and to direct their deportation if their inadmissibility is discovered only after entry has been effected. Section 212(a), 8 U.S.C. 1182(a) is in large measure a catalog of such disqualifying conditions. These provisions of the statute are in no sense guides to conduct, and the application to them of the principle requiring definiteness in behavior-governing statutes can have no rational justification. Whether the administrative proceeding in which such a provision is pertinent be one to exclude or deport, the sole inquiry is whether the alien is (or at entry was) in one of the classes which Congress intended to exclude. The administrative authorities may properly look to any available source, including the legislative history of a particular provision, to ascertain the legislative intent. Section 241(a)(1), requiring the deportation of aliens who managed to effect entry notwithstanding their legal ineligibility to enter, can in no sense be regarded as a notice-giving statute, warning aliens of the kind of behavior from which they must refrain if they wish to avoid deportation.

2. The decision below seeks to avoid this conclusion by pointing out that, "[w]hile the post-entry conduct [of respondent] was not itself the ground of deportation," such conduct "was used as evidence of a pre-entry deportable condition"—with the consequence, it is said, that respondent was prejudiced by the vagueness of the term "psychopathic personality" in the challenged provision (Appendix A, *infra*, p. 27). The court reasoned that since, "[i]nsofar as the record reveals, continuance of homosexual prac-

tices after Fleuti entered this country in 1952, and again in 1956, was not compulsive, but was a matter of choice," he might not have engaged in such practices in this country had he been adequately warned by the statute that "harsh results," *i.e.*, deportation, might follow if he did not refrain from such conduct (Appendix A, *infra*, pp. 26–27). The court thus applied the void-for-vagueness principle, requiring definiteness in statutes imposing sanctions on future conduct, to an enactment which prescribes no such sanction, but, instead, undertakes to define a psychopathic condition making aliens who would enter this country ineligible to do so.

No precedent exists for so sweeping and far-reaching an application of the void-for-vagueness rationale. The court here limited its holding to the statute's impact on the alien's post-entry behavior. But it is difficult to see why the court's rationale, if sound, would not apply to pre-entry behavior as well. Under such a view, an alien whom the immigration authorities barred at our gates on the ground that he was afflicted with a condition, *e.g.*, homosexuality, which Congress clearly intended should make him ineligible for entry, could claim standing to challenge the pertinent statutory section for vagueness on the ground that, but for the lack of precision in the language of the statute, he might have so conducted himself before reaching our shores as to have avoided supplying the evidence from which the immigration authorities inferred his disqualifying trait.

3. The decision below is in conflict with *Quiroz* v. *Neelly*, 291 F. 2d 906, in which the Court of Appeals for the Fifth Circuit sustained the deportation of a homosexual under the same provisions of law as those involved here. The court, after referring to the legislative history of Section 212(a)(4), observed (291 F. 2d at 907):

> Whatever the phrase "psychopathic personality" may mean to the psychiatrist, to the Congress it was intended to include homosexuals and sex perverts. It is that intent which controls here.

Moreover, the issue presented is a recurring one in the administration of the immigration laws; other cases are now pending in the courts involving deportation orders predicated on the same provision of Section 212(a)(4).*

* *Reinsch* v. *Rosenberg*, C.A. 9, No. 17691, involves an alien ordered deported because inadmissible on reentry in 1960 as a psychopathic personality, a finding based on acts of exhibitionism. On April 5, 1962, the court of appeals directed that the cause be resubmitted at the time of final disposition of the instant case. *Frosinos* v. *Immigration and Naturalization Service*, C.A. 6, No. 14987, involves an alien ordered deported because inadmissible on reentry in 1961 as a psychopathic personality, a finding based on acts of window-peeping and exhibitionism. Counsel for the alien have requested the United States Attorney to stipulate for continuance, pending final disposition of the present case. *La Rochelle* v. *Sahli*, C.A. 6, No. 14813, involves an alien ordered deported because inadmissible on reentry in 1960 as a psychopathic personality, a finding based on acts of homosexuality.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ARCHIBALD COX,
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JULY 1962.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE FLEUTI, APPELLANT-PETITIONER, *vs.* GEORGE K. ROSENBERG, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, LOS ANGELES, CALIFORNIA, APPELLEE-RESPONDENT

No. 17,325. April 17, 1962

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

Before: CHAMBERS, HAMLEY and DUNIWAY, Circuit Judges.

HAMLEY, *Circuit Judge:*

George Fleuti, a resident alien, was ordered deported by the Immigration and Naturalizaton Service on the ground that at the time of his entry he was a "psychopathic personality." Having exhausted his administrative remedies, Fleuti brought this action in the district court to review that order. The district court entered judgment upholding the order of deportation, and Fleuti appeals.

For the reasons indicated in the margin we consider the case as before us for initial review, pursuant to 8 U.S.C., § 1105a, and 5 U.S.C., § 1031, et seq., rather than on appeal from a district court judgment.[1] Fleuti will be regarded as the petitioner and George K.

[1] Section 5(a) of the Act of September 26, 1961, 75 Stat. 651, added a new section 106(a) to the Immigration and Nationality

Rosenberg, District Director of Immigration and Naturalization Service, Los Angeles, as respondent. Under the circumstances of this case our reviewing function is substantially the same as was that of the district court which initially reviewed the deportation order.

Fleuti contends that the order is invalid because not based upon reasonable, substantial and probative evidence. He further contends that execution of the order would violate the Due Process Clause of the

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Act, 8 U.S.C. § 1105a. This new section provides that the procedure prescribed for the review of other federal agency orders (5 U.S.C., § 1031, et seq.) shall be the sole and exclusive procedure for the judicial review of deportation orders entered pursuant to section 242(b) of the Immigration and Nationality Act. Section 5(b) of the Act of September 26, 1961, provides that any judicial proceeding to review an order of deportation "which is pending unheard" in any district court on the effective date of that section (October 26, 1961), with exceptions not here relevant, shall be transferred for determination to the court of appeals having jurisdiction to entertain a petition for review under that section.

The case before us was disposed of by the district court prior to October 26, 1961, thus a transfer of the cause to this court under the statutory provision referred to above was not required at that time. We note, sua sponte, however, that Fleuti seeks to restrain the enforcement of a deportation statute on the ground, which we find substantial, that the statute is unconstitutional as applied to him. The case should therefore have been heard by a district court of three judges. 28 U.S.C., § 2282; *Wolf* v. *Boyd*, 9 Cir., 287 F. 2d 520.

But if we now remand the case because of failure to convene a three-judge court, it would become a judicial proceeding "which is pending unheard" before the district court. It would then be necessary for the district court to transfer the case back to us as provided in section 5(b) of the Act of September 26, 1961 referred to above. It follows that, to avoid circuity, this court should consider the case as having been so remanded and transferred back and therefore now before us as an initial judicial review pursuant to 8 U.S.C., § 1105a and 5 U.S.C. § 1031 et seq.

Fifth Amendment because, as applied to him, the statute in using the term "psychopathic personality" is void for vagueness.

Fleuti is a native and citizen of Switzerland. He was admitted to the United States for permanent residence on October 9, 1952. He remained in this country until August, 1956, when he visited for a few hours in Ensenada, Mexico. He then re-entered as a returning resident alien and has remained in this country since then.

The charges upon which the deportation order is based were filed against Fleuti on August 5, 1959. It was alleged that Fleuti is deportable because, at the time of his 1956 entry, he was within a class of aliens excludable by the law existing at the time of such entry, namely aliens afflicted with "psychopathic personality." The statutes cited as authorizing deportation on such a showing are sections 241(a) and 212(a)(4) of the Immigration and Nationality Act, 8 U.S.C., §§ 1251(a) and 1182(a)(4).[2]

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[2] Section 241(a) reads in part:

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry; * * *."

Section 212(a)(4) reads in part:

"(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(4) Aliens afflicted with psychopathic personality, epilepsy, or a mental defect; * * *."

The quoted language of section 212(a)(4) was added to the statute on June 27, 1952, which was before Fleuti's first entry, but did not become effective until December 24, 1952, which was after that entry.

It was not stated in the formal charges what specific physical or mental condition Fleuti had at the time of his 1956 entry which brought him at that time within the class of aliens afflicted with "psychopathic personality." Attached to the charges, however, was a sheet on which certain factual allegations were listed, as set out in the margin.[3] It is thereby indicated that the particular condition thought to bring Fleuti within the stated class was his alleged affliction with the desire for, and regular indulgence in, homosexual practices over a long period of years.

It is an established principle of federal adjudication that questions of constitutional law are not to be dealt with in advance of the necessity of deciding them. See *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 72. It would therefore at first blush appear that we ought to first consider Fleuti's contention that the deportation order is not based upon adequate evidence, on the theory that if this question is decided in his favor we need not reach the constitutional question which he poses.

The difficulty in following this course, however, lies in the fact that: (1) in order to determine whether the evidence is sufficient it is necessary to decide what is meant by "psychopathic personality"; (2) this term is not defined in the statute and re-

[3] You were examined by a Medical Officer of the United States Public Health Service at Los Angeles, California on June 18, 1959; you were certified by an official of that Service, on that date, as being afflicted with "Class A Psychopathic Personality"; that official further certified on that date, that this "condition existed prior to and at the time of entry (August 1956)"; you have been afflicted with the desire for sexual relations with members of your own sex for approximately the past twenty-two (22) years; you have indulged in the practice of sexual relations with members of your own sex at periodic intervals, averaging about once a month, for the past twenty-two (22) years.

spondent relies upon the legislative history in order to establish the meaning of the term;[4] but (3) if the statute, judged on its face and as applied to Fleuti, is void for vagueness, access may not be had to the legislative history in order to establish its meaning.[5]

[4] Arguing that the term was intended to include, among others, anyone who was a homosexual or sex pervert at the time of entry, respondent calls attention to S. Rep. No. 1137, 82nd Cong., 2nd Sess. (1952). That report contains the following statement:

> "Existing law does not specifically provide for the exclusion of homosexuals and sex perverts. The provisions of S. 716 which specifically excluded homosexuals and sex perverts as a separate excludable class do not appear in the instant bill. The Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect which appears in the instant bill is sufficiently broad to provide for the exclusion of homosexuals and sex perverts. This change of nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates."

[5] The doctrine of void-for-vagueness is premised in part on the fiction that all persons in fact know the contents of statutes. But this fiction does not extend to the point of assuming that all persons in fact know the relatively inaccessible legislative history of statutes. Thus it is uniformly held that in applying the doctrine, a federal statute must be judged on its face. See *United States* v. *Harriss*, 347 U.S. 612, 617; *United States* v. *Spector*, 343 U.S. 169, 171.

Once it is ascertained that the language of the statute is sufficiently definite to satisfy due process standards, the legislative history may become relevant. But the function of such history is not to provide support for an otherwise deficient law; rather it is to assist the court in best effectuating the legislative intent by possible construction and limitation of the statutory language. Hence, if the challenged class of offenses seems plainly within the terms of the statute, legislative history may be consulted to verify this conclusion. See *Harriss*, *supra*, at 618, 620–622.

It is therefore necessary for us to proceed at once to the constitutional question.

The question of whether a statute is void for vagueness most frequently arises in criminal prosecutions.[6] In such cases the underlying principle is said to be that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. *United States* v. *Harriss*, 347 U.S. 612, 617.

But the Supreme Court has also applied this principle in civil proceedings, and in so doing has expressly ruled that a criminal penalty need not be involved. See *Small Company* v. *American Sugar Refining Company*, 267 U.S. 233, 239, where the court said, referring to other decisions in which the principle had been applied:

> * * * It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all.

In *Jordan* v. *DeGeorge*, 341 U.S. 223, the court examined, for vagueness, a statute which had been invoked in ordering deportation of that appellant. The court stated that it would do so notwithstanding the fact that it was not a criminal statue.[7] In that case the deportation had been ordered because a proscribed event had occurred after the alien entered this country, namely, "conviction in this country of any crime involving moral turpitude." The particular crime which was held to involve moral turpitude

[6] See 109 U. Pa. L. Rev. 67 for an extensive discussion of the vagueness doctrine in the Supreme Court.

[7] It was held, as a result of that examination, that the particular statute there in question was not unconstitutionally vague.

was conspiracy to defraud the United States of taxes on distilled spirits.

In the case before us, deportation has been ordered not because of any event occurring or act committed after Fleuti's last entry in August 1956, but on the ground that, at the time of that entry, he was excludable as a "psychopathic personality."

However, in proving that, at the time of such entry, Fleuti was a "psychopathic personality," the Immigration and Naturalization Service has not relied exclusively upon evidence concerning Fleuti's condition prior to entry.[8] It presented evidence showing not only that Fleuti had regularly engaged in homosexual practices prior to his first entry in 1952, but that he had continued such practices after that entry and also after his second entry in 1956.[9] The finding that he was a "psychopathic personality" at the time of the 1956 entry is therefore based in part upon post-entry behavior.

Insofar as the record reveals, continuance of homosexual practices after Fleuti entered this country in 1952, and again in 1956, was not compulsive, but was a matter of choice. It follows that if, by reason of vagueness, the statute failed to advise him that homosexual practices conclusively evidence a "psychopathic

[8] Nor was it required to, absent a question of statutory vagueness. See *United States ex rel. Powlowee* v. *Day*, 2 Cir., 33 F. 2d 267.

[9] This evidence consisted of Fleuti's acknowledged history of such practices from 1936 to 1959, and proof of two convictions obtained against him in the courts of California. One of these convictions, obtained in the Municipal Court of Los Angeles, under section 647(5) of the Penal Code of California, relating to lewd and dissolute persons, was for an act committed on August 23, 1953. The other, obtained in the Los Angeles Superior Court under section 288a of the Penal Code of California, relating to homosexual acts, was for an act committed February 16, 1956.

personality" Fleuti was substantially prejudiced. As in the case of a vague criminal statute, he would thereby be deprived of notice that unless he refrained from such conduct harsh results might follow.

While the post-entry conduct was not itself the ground of deportation, but was used as evidence of a pre-entry deportable condition, the prejudice would nevertheless be substantial. The examiner might have found the evidence of pre-entry homosexual practices sufficient to support a finding of "psychopathic personality." But whether such a finding would have been entered in 1959, based on pre-entry conduct prior to October 9, 1952, or whether on such facts a charge would even have been brought, is a matter of speculation.[10] The fact that the examining officer chose to rely heavily upon post-entry behavior is some indication that a charge might not have been filed, or a finding entered, on pre-entry behavior alone.

From what has just been said, it will be observed that, for the purposes of this discussion, we regard Fleuti's conduct between his entry in 1952 and his brief absence in 1956, along with his conduct after his re-entry in 1956, as post-entry behavior. If, dur-

[10] It was originally sought to deport Fleuti, pursuant to sections 241(a) and 212(a)(9) of the Immigration and Nationality Act, 8 U.S.C., §§ 1251(a)(1), 1182(a)(9), as a resident alien who had been convicted of a crime involving moral turpitude. The conviction relied upon was one of those referred to in footnote 9 above. A summary order of deportation was issued on the basis of that charge. It was later set aside by the examining officer, however, on the ground that the conviction relied upon, being a misdemeanor classified as a petty offense, was not one for which deportation could be ordered, in view of certain exceptions contained in the Act. But at the same time that this deportation order was set aside, the administrative proceedings were reopened to receive and consider the new charge that Fleuti was a "psychopathic personality" at the time of his last entry.

ing the years 1952 to 1956, Fleuti was prejudiced by reason of the vagueness of the statute, he may assert such prejudice now, notwithstanding his temporary leave-taking in 1956. The prejudice occurred while he was a resident alien and his constitutional rights as such, acquired during that period, were not "washed out" by his afternoon visit to Ensenada, Mexico.

The question which remains to be decided is whether the deportation statute, in using the undefined term "psychopathic personality" is void for vagueness, as applied in this case.[11]

In determining whether a statute is vague in the constitutional sense, the test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *Jordan* v. *DeGeorge*, at page 231. Or, as stated in *United States* v. *Harriss*, 347 U.S. 612, 617, and *United States* v. *Petrillo*, 332 U.S. 1, 6, would persons of "ordinary intelligence" be able to know what the statute means.

It has already been pointed out (see note 5 above) that in determining whether a statute is void for vagueness, the statute must be judged on its face, without reference to legislative history. We are mindful of the fact that language which is otherwise vague may be made sufficiently certain by definitive construction, even though the language construed is found in other statutes. *Jordan, supra* at 227. However, at the time this post-entry conduct occurred, there was

[11] Following the technique employed by the Supreme Court in similar cases, we consider the question in the context of the case before us without undertaking to determine whether the statute is necessarily void for vagueness with regard to all possible applications. See *Williams* v. *United States*, 341 U.S. 97, 101; *Jordan* v. *DeGeorge*, 341 U.S. 223, 232.

no decisional law as to the meaning of the term as used in this or any other federal statute.[12]

Dr. A. R. Dahlgren, the Public Health Service surgeon who had certified that Fleuti was a "psychopathic personality," testified that he did so because the Public Health Service manual for medical examination of aliens required him to so certify anyone who is a sex deviate. Dr. Dahlgren, who is not a psychiatrist, did not consider whether Fleuti's condition was hereditary, congenital, environmental or otherwise. His finding was merely that Fleuti was a sexual deviate and that "by the instructions which I must follow, I have to place these deviates in this category."[13]

Dr. David R. Harvey, Fleuti's attending psychiatrist, was of the opinion that Fleuti's deviation is not sufficient to justify the diagnosis of "psychopathic

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[12] The term "psychopathic personality" was used in a Minnesota statute; however, the term was expressly and narrowly defined in the statute and such definition was further construed and limited by the Supreme Court of Minnesota. In the light of such definition and construction, the United States Supreme Court had no difficulty in holding that the statutory term, as there used, was not too vague and indefinite to constitute valid legislation. *Minnesota* v. *Probate Court*, 309 U.S. 270. However, the government is not in a position to argue that this case adds certainty or definiteness to the term as used in the Immigration Act, because Fleuti would clearly not be classed as a "psychopathic personality" under the Minnesota statute.

[13] Dr. Dahlgren further testified: "We have to use certain terminology—and the rest of the world may not agree with this terminology; we are so ordered, therefore we do. * * *" The doctor agreed that a standard definition of "psychopathic personality" would specify that it be a "constitutional" disorder due to hereditary or congenital conditions, and stated that he had no "strong feeling as to whether, according to traditional medical terms, Fleuti would be considered a 'psychopathic personality.'"

personality." He stated that the formal label for Fleuti's condition would be that of "sexual deviation, homosexuality, now under control."[14]

It is apparent that these two doctors, confronted with the identical facts, applied different standards in determining whether Fleuti was a "psychopathic personality." Dr. Dahlgren, feeling himself bound by the Public Health Service Manual, applied the test of whether Fleuti was a sex deviate, apparently ending the inquiry at that point. Dr. Harvey, while not insisting upon a showing of hereditary or congenital condition, considered such additional factors as the extent of the deviation, its effect upon other habits and activities, and whether control over the practice had been manifested.[15]

It is not surprising that these two doctors gave widely varying meanings to the term "psychopathic

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[14] Dr. Harvey expressed this further opinion:

"* * * He (Fleuti) does not frequent homosexual hangouts, has no evident interest in youths, manifests no irresponsible trends, and has his main social contacts with respected members of the community. * * * His sexual drive—particularly at his age—is thought to be within his range of control, especially if he is under the supervision of continuing contact with a psychiatrist. * * * His deviation is not sufficient to justify the diagnosis of psychopathic personality. * * * I do not think that another psychiatrist with adequate training and experience will be likely to disagree with my findings."

[15] According to most present-day psychiatrists, "psychopathic personality" is attributable to environmental factors, whereas the earlier view was that this condition was either hereditary or congenital. The term has always been understood as referring to a lifelong pattern of behavior in conflict with social norms but without accompanying guilt or anxiety. The medical authorities and writers who have expressed these views are collected in a Note and Comment, 68 Yale L.J. 931, at 935, note 10.

personality."[16] Congress was content to let "psychopathic personality" stand for "homosexuals" and "sex perverts," because the Public Health Service advised it that the term is "sufficiently broad" to accomplish this.[17] But the Public Health Service itself considered the term vague, saying in a report which was before the Congress in 1952:

> Although the term "psychopathic personality" is vague and indefinite, no more appropriate expression can be suggested at this time.[18]

The Public Health Service view that the term is "vague and indefinite" is confirmed by authoritative writers in this field. Expert opinions to this effect, collected at page 940, note 33 of the article referred to in note 15 herein, are quoted in the margin.[19]

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[16] It is not established that Dr. Dahlgren would have differed with Dr. Harvey, if he had felt free to express his own opinion as to the term, rather than feeling obliged to apply the Public Health Service definition.

[17] S. Rep. No. 1137, 82nd Cong. 2nd Sess. (1952).

[18] Report of the Public Health Service on the medical aspects of H.R. 2379, in H.R. Rep. No. 1365, 82nd Cong., 2nd Sess. 46–47 (1952)

[19] Noyes, *Modern Clinical Psychiatry*, 3d ed. 1941, 410: Psychopathic personality

"* * * is considered by many to be a meaningless designation * * * not yet is there any common agreement * * * as to classification or * * * etiology."

Curran & Mallinson, *Psychopathic Personality*, 90 J. Mental Sci., (1944) 266, 278:

"The only conclusion that seems warrantable is that, at some time or other and by some reputable authority, the term psychopathic personality has been used to designate every conceivable type of abnormal character."

Guttmacher: *Diagnosis and Etiology of Psychopathic Personalities as Perceived in Our Time*, in Current Problems in Psychiatric Diagnosis, (Hoch & Zubin, ed. 1953), 139, 154:

It therefore appears that the medical experts called to apply the term in this particular case are in disagreement as to what it means, the Public Health Service which asked Congress to use the term concedes that it is "vague and indefinite," and authoritative writers state that there is confusion and general disagreement as to its meaning.

The conclusion is inescapable that the statutory term "psychopathic personality," when measured by common understanding and practices, does not convey sufficiently definite warning that homosexuality and sex perversion are embraced therein. Since this statutory term thus fails to meet the test to be applied in determining whether a statute is vague in the constitutional sense, we hold that the statute is void for vagueness, as applied in this case. Enforcement of the order of deportation would therefore deprive Fleuti of the due process of law.

The order of September 22, 1959 for the deportation of George Fleuti is declared to be void, that order is hereby set aside, and enforcement of the order is enjoined.

(Endorsed) Opinion Filed April 17, 1962.

FRANK H. SCHMID, *Clerk.*

"At present, the diagnosis of a psychopathic personality is practically meaningless."

Tappan, *Sexual Offenses and Treatment of Sexual Offenders in the United States*, in Sexual Offenses, 500, 507, (Radzinowics ed. 1957):

"* * * consensus is impossible in the no-man's land of psychopathic personality."

See also *The Psychopathic Delinquent and Criminal* by George N. Thompson, M.D. F.A.C.P., 42:

"The term 'psychopathic personality' has been used in an extremely broad sense in American psychiatry * * * Loose usage of the term has caused confusion in thinking."

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION APPEALS

NOVEMBER 20, 1959.

File: A-8382428—Los Angeles

In re: GEORGE ERNST MARCEL FLEUTI

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Richard F. Porter, Esquire, 202 North Hawthorne Boulevard, Hawthorne, California

CHARGES:

Order: Section 241(a)(1), Act of 1952 (8 U.S.C. 1251(a)(1))—Excludable at time of entry under Section 212(a)(9) of the Act (8 U.S.C. 1182(a)(9))—Convicted of a crime involving moral turpitude, to wit, sex perversion

Lodged: Section 241(a)(1), Act of 1952 (8 U.S.C. 1251(a)(1))—Excludable at time of entry under Section 212(a)(4) of the Act (8 U.S.C. 1182(a)(4))—Afflicted with psychopathic personality

APPLICATION: Voluntary departure

The respondent, a 47-year-old alien, a native and citizen of Switzerland, appeals from a decision on September 22, 1959, directing deportation on the charge lodged in the proceedings, namely, that under Section 241(a)(1) of the Immigration and Nationality Act the respondent is deportable, in that, he was excludable at the time of entry in August 1956

under Section 212(a)(4) of the Act as an alien afflicted with psychopathic personality. The charge in the Order to Show Cause, which is assigned under Section 241(a)(1) of the Immigration and Nationality Act, alleging that the subject was excludable at time of entry under Section 212(a)(9) of the Act, as one convicted of a crime involving moral turpitude, to wit: sex perversion, has not been sustained.

Counsel excepts to the findings that the alien is deportable on the charge lodged in the hearing. He also excepts to the finding that the alien's application for voluntary departure should be denied (8 U.S.C. 1254(e)).

There have been a series of hearings in this case. Following the initial hearing the special inquiry officer ordered deportation on April 20, 1959. On motion presented by the examining officer on July 6, 1959, to reopen the hearing, an order was entered granting the motion on July 22, 1959. This appeal comes forward following the reopened hearing.

The respondent was admitted to the United States on October 9, 1952, at Rouses Point, New York, for permanent residence. He last entered at San Ysidro, California, during August 1956 as a legally resident alien returning to resume residence. Exhibit 2 in the record is a document showing the respondent's conviction in Los Angeles County, California, on plea of guilty on March 16, 1956, to violation of Section 288a of the Penal Code of California (sex perversion, committed February 16, 1956). He was directed to pay a fine of $200, or to serve one week in jail for each five dollars of fine not paid. The fine was paid. The special inquiry officer has correctly found that the offense involves moral turpitude.

Exhibit 7 is a court record showing the respondent's conviction in the Municipal Court, Los Angeles

County, California on August 27, 1953, for violation of subdivision 5 of Section 647 of the Penal Code of that state, in that he was wilfully and unlawfully a lewd and dissolute person. He was sentenced to pay a fine of $100 or serve one day's imprisonment for each five dollars of the fine. The fine was paid (Exhibit 7). This crime does not involve the element of moral turpitude (*Matter of G– B–*, 5 I&N Dec. 18).

The special inquiry officer has decided that within the provisions of Section 17, California Penal Code, defining felonies and misdemeanors, the alien's conviction in 1956 may be classified as a misdemeanor within Section 1(3) of Title 18, U.S.C. Since the conviction in 1953 does not involve moral turpitude, consideration under the provisions of Section 4 of the Act of September 3, 1954 (Public Law 770) is not precluded to wipe out the conviction in 1956 as a ground for deportation (*Matter of C–*, 6 I&N Dec. 331). Accordingly, the respondent was not excludable at the time of last entry as charged in the Order to Show Cause. As previously stated, that charge has not been sustained.

The order for deportation is based on the charge lodged in the reopened hearing. The special inquiry officer has carefully set forth the evidence, supporting such charge. The evidence consists of a medical certification, the testimony of a physician of the United States Public Health Service, the court records of two convictions, and a statement by the respondent's private physician-psychiatrist. The special inquiry officer has made specific findings and conclusions relative to the charge on which the deportation order is based.

Counsel alleges that the Government has not shown by preponderance of the evidence that the respond-

ent is deportable. With respect to that allegation, counsel disagrees with Finding of Fact No. 6, namely, that on June 18, 1959 the respondent was certified by a senior surgeon of the United States Public Health Service as being afflicted with a Class A condition, "psychopathic personality", which condition existed prior to, and at the time of last entry in August 1956. The medical certificate and the testimony of the certifying physician are evidence which, in part, establishes that the respondent was excludable at time of last entry (p. 26 and Exhibit 5).

In adjudicating the issue of deportability in this, an expulsion proceeding, all of the relevant evidence pertaining to the question in issue may be considered. In summarizing the evidence, relating to the allegations in the lodged charge herein, the special inquiry officer has discussed all of the evidence consisting of the medical certification (Exhibit 5), the admissions made by this subject to a Service investigator under oath on March 25, 1959 (Exhibit 6), the court records showing criminal convictions (Exhibits 2 and 7), and other testimony and statements. Aside from the court records of criminal convictions for improper sexual behavior during the past six years (Exhibits 2 and 7), which cannot be disputed by the respondent, the alien who is age 47 years has admitted that he has had the homosexual urges (the urge to commit homosexual acts with men) since he was age 20 years; and that he has committed acts of sex perversion, intermittently and frequently for a period of 22 years (Exhibit 6).

The respondent's medical adviser, a psychiatrist, who has examined him on four occasions has diagnosed his condition as "sexual deviation, homosexuality, now under control" (Exhibit 8). The senior surgeon, United States Public Health Service, A. R. Dahlgren who gave the certification on June 18, 1959, had before

him at that time the alien's history including admissions of numerous acts of sexual relations with men. Dr. Dahlgren has testified in the reopened hearing and has submitted to cross examination. He has explained that the legal term, psychopathic personality is equivalent to the medical designation "personality disorders" which may be broadly defined; and that they are characterized by development defects or pathological trend in the personality structure, with minimal subjective activity and little or no distress. In most instances the disease is manifested by a life-long pattern of action or behavior rather than by mental or emotional symptoms. He has also explained that within the definitions and the instructions set forth in the Manual for Medical Examination of Aliens the respondent's condition is diagnosed as sexual deviation (Part II, Class A condition, Chapter 6, Section A, 6, Manual for Medical Examination of Aliens) (pp. 30-34 inclusive and Exhibits 5, 6).[1]

[1] 6. Psychopathic personality.

a. The legal term "psychopathic personality" is equivalent to the medical designation "personality disorder," which may be broadly defined as follows: "These disorders are characterized by developmental defects or pathological trends in the personality structure, with minimal subjective anxiety and little or no distress. In most instances, the disorder is manifested by a life-long pattern of action or behavior (acting out), rather than by mental or emotional symptoms". An example of such a certificate is Class A, Psychopathic personality, Inadequate personality.

b. *Under this legal category will be classified those applicants who are diagnosed as sexual deviates.* In the medical examination of aliens this is a difficult diagnosis to establish. However, the examiner should assist the consular officer when possible in evaluating an applicant thought to come in this category.

We find that the alien's admissions, the testimony of a physician and his medical certification, and court documents in this record, undisputed, places the respondent's condition within the allegations set forth in the charge lodged in this hearing. We further find that such affliction or condition existed at time of his last entry and constituted a ground of excludability. We do not find from the fact that the respondent is receiving treatment by Dr. R. M. Harvey, a psychiatrist, who is of the opinion that the condition may be controlled if the alien is under the supervision of a psychiatrist, is in any way in conflict with the medical findings of Dr. A. R. Dahlgren on June 18, 1959. Nor do we find that treatment and control of the affliction now is a defense to a finding of deportability. The contentions of counsel are without merit. The allegations in the charge upon which deportability is based are supported by reasonable, substantial and probative evidence.

The special inquiry officer has denied an application for voluntary departure as a matter of administrative discretion. This means that, although the respondent may meet all the requirements for the relief he seeks, his request for relief has been denied as a matter of discretion. Under the factual situation, the Board has no jurisdiction to change the decision of the special inquiry officer, with regard to the exercise of discretion, unless there have been mistakes, errors, prejudice or abuse of discretion. Our careful review of the proceedings reveals no basis for change of the special inquiry officer's decision. The appeal will be dismissed.

ORDER: It is ordered that the appeal in this case be dismissed.

/s/ THOS. G. FINUCANE,
Chairman.

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
SEPTEMBER 22, 1959.

File No. A8 382 428—Los Angeles
In re: GEORGE ERNST MARCEL FLEUTI
IN DEPORTATION PROCEEDINGS
IN BEHALF OF RESPONDENT: Richard F. Porter, Esq., 202 North Hawthorne Boulevard, Hawthorne, California
IN BEHALF OF THE SERVICE: Richard L. Lay, Examining Officer (Los Angeles, California)
CHARGES:

Order: Sec. 241(a)—I&N Act—Excludable at time of entry under Sec. 212(a)(9) of the Act—Conviction of a crime involving moral turpitude, to wit: Sex perversion

Lodged: Sec. 241(a)(1)—I&N Act—Excludable at time of entry under Sec. 212(a)(4) of the Act—Afflicted with psychopathic personality

APPLICATION: Voluntary departure in lieu of deportation
ORDER TO SHOW CAUSE SERVED: April 7, 1959

DISCUSSION

The respondent appeared before me in a hearing in deportation proceedings on April 20, 1959, and admitted as being true all of the factual allegations contained in the order to show cause and that he was subject to deportation on the charge set forth in the or-

der. On the basis of these admissions a summary order of deportation was issued the same date.

On July 6, 1959, the Examining Officer for the Government moved to reopen the proceedings for the submission of additional evidence bearing on the issue of deportability, and the motion was granted by the Special Inquiry Officer on July 22, 1959.

The certified copy of the Information filed in the criminal proceedings relating to the respondent's conviction as alleged in allegation No. 5 in the order to show cause and admitted as being true recites that he was charged with a violation of Section 288a of the Penal Code of California, *a felony* (emphasis supplied), and a certified copy of the plea of guilty and judgment also refers to the offense charged as a felony (Ex. 2). In the motion to reopen the Examining Officer concedes that the foregoing conviction was for a misdemeanor and not a felony; that by reason of the punishment actually imposed such misdemeanor was classifiable as a petty offense and consequently the respondent was not subject to exclusion at the time of his last entry into the United States at San Ysidro, California, during August 1956 by virtue of the exemption from excludability provided for in Section 4 of the Act of September 3, 1954. The Special Inquiry Officer agrees with this conclusion for reasons which will be more fully set forth below.

Section 17 of the Penal Code of California defines a felony and a misdemeanor as follows:

> A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a pun-

ishment other than imprisonment in the state prison.

Section 288a of the Penal Code provides among other things that an offender may be punished by imprisonment in the state prison for not exceeding 15 years, or by imprisonment in the county jail not to exceed one year. Under certain circumstances, not present in this case, the punishment is mandatory that imprisonment shall be in the state prison for not less than three years. The judgment of the court (Ex. 5) shows that the respondent was sentenced to pay a fine of $200 within one week or serve one day in the county jail for each five dollars of said fine not paid. The fine was paid and he did not serve any term of imprisonment. It is clear that under the provisions of Section 17 of the Code the offense for which he was convicted must be considered a misdemeanor.

It having been found that he was convicted of a misdemeanor only, it must be determined if he is eligible for consideration under the provisions of Section 4 of the Act of September 3, 1954, as having committed an offense which is a misdemeanor classifiable as a petty offense under the provisions of Section 1(3) of Title 18, United States Code, by reason of the punishment actually imposed and if he has committed only one such offense. If these questions are answered in the affirmative, then he would not be deportable on the charge contained in the order to show cause as an alien excludable at the time of entry under the provisions of Section 212(a)(9) of the Immigration and Nationality Act because of conviction of a crime involving moral turpitude. The words of condition in the statute, "* * * provided, that the alien has committed only one such offense," are deemed to relate back and to mean only another

offense which would, because of its commission, render the alien excludable. It follows that such other offense must necessarily involve moral turpitude, otherwise it would not constitute a ground of excludability.

Section 1(3) of Title 18, United States Code, provides:

> Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.

The evidence of record shows that the respondent was also convicted in the Municipal Court, Los Angeles, California, on August 27, 1953, for violation of subdivision 5 of Section 647 of the Penal Code in that he was wilfully and unlawfully a lewd and dissolute person. He was sentenced to pay a fine of $100 or serve one day's imprisonment for each five dollars of the fine. The fine was paid (Ex. 7). It has been held that such an offense is not a crime involving moral turpitude (*Matter of G– R–*, 5 I&N Dec. 18).

It is concluded that the offense for which the respondent was convicted on March 9, 1956 (violation of Section 288a of the Penal Code) was a misdemeanor classifiable as a petty offense, and as he has not admitted the commission, or been convicted of more than this one crime which involves moral turpitude, he is not deportable on the charge contained in the order to show cause.

There was subsequently lodged in the proceedings the additional charge that he is subject to deportation pursuant to the provisions of Section 241(a)(1) of the Immigration and Nationality Act in that at the time of entry he was excludable under Section 212(a)(4) of the Act as an alien afflicted with psy-

chopathic personality (Ex. 4). He denied in the reopened hearing the truth of the lodged allegations Nos. 9 and 10, which alleged that he had been afflicted with the desire for sexual relations with members of his own sex for approximately the past 22 years and that he had indulged in the practice of sexual relations with members of his own sex at periodic intervals, averaging about once a month, for the past 22 years. He admitted the truth of the lodged allegations Nos. 6, 7 and 8 to the effect that he was examined by a medical officer of the United States Public Health Service at Los Angeles, California, on June 18, 1959; that he was certified by an official of that Service on that date as being afflicted with "Class A Psychopathic Personality;" and that this official further certified on that date that this condition existed prior to and at the time of entry in August 1956.

In a sworn statement made to an Immigration Officer at Ventura, California, on March 25, 1959 (Ex. 6) he admitted having engaged in homosexual acts on many occasions for about 22 years, both before and after his arrival in the United States, but that he had never been arrested for such conduct until he committed such an act in a public park in Los Angeles, California. Since his second arrest he has taken precautions not to be caught, because he believed that if he were, he would be in difficulty with the Immigration authorities. These admissions of the respondent have not been controverted. He admitted that he had read this statement before signing it and that he had testified truthfully. An objection to the statement's introduction in evidence was overruled (8 C.F.R. 242.14(c)). He also denied deportability on the additional charge lodged in the reopened hearing.

On June 18, 1959, he was certified by a United States Public Health Service Senior Surgeon as being afflicted with a Class A condition, Psychopathic Personality, and that this condition existed prior to and at the time of his entry into the United States in August 1956 (Ex. 5). This certification was based upon a personal examination and interview of the respondent by the medical officer who prepared it. There was no substantial fact or facts developed in cross-examination of this medical officer that would tend to disprove his finding that the respondent was at the time of entry a psychopathic personality. In fact, a report of examination by the respondent's own psychiatrist conducted on May 20, June 22, July 8, and August 7, 1959, shows that his condition was diagnosed as "Sexual deviation, homosexuality, now under control" (Ex. 8). This report further recites that his deviation is not sufficient to justify the diagnosis of psychopathic personality and that he is not a danger to any other person. This last conclusion and references in the report to the California Code regarding sexual psychopaths are not relevant to the deportation charge.

The term "psychopathic personality" is a legal term and is equivalent to the medical designation of "personality disorder." It also covers disorders other than those manifested by a sexual deviate, although the latter must be classified as a psychopathic personality (United States Public Health Service Manual for Medical Examination of Aliens, Part II, Chapter 6, Section A, Paragraph 6).

The question of whether homosexuals or sex perverts are persons of psychopathic personality has been thoroughly and exhaustively discussed in the decision of the Board of Immigration Appeals in *Matter of P–*, 7 I&N Dec. 258. The facts in that case are closely

analogous to the present case. In *Matter of P–* the Board found that the excluding provisions of Section 212(a)(4) of the Immigration and Nationality Act relating to persons of psychopathic personality include homosexuals and sexual perverts and that the respondent's admissions of homosexual tendencies and homosexual acts prior to entry plus the certification, based on those admissions, of the United States Public Health Service that he was a person of psychopathic personality was sufficient to support a finding of deportability under Section 241(a)(1) of the Act as having been excludable at the time of entry as a person afflicted with psychopathic personality. In this connection see also *U.S.* v. *Flores-Rodriguez,* 237 F. 2d 405 (2 Cir. 1956).

It is concluded on the basis of all of the evidence of record and the cited cases that the charge lodged at the reopened hearing is sustained.

DISCUSSION AS TO ELIGIBILITY FOR DISCRETIONARY RELIEF

The respondent is a 47-year-old single male, a native and citizen of Switzerland. He has never been married. He was admitted to the United States for permanent residence at Rouses Point, New York, on October 9, 1952, and except for a one-day visit to Ensenada, Mexico, in August of 1956, he has resided continuously in this country since that entry. He is and has been for several years past employed as a hotel desk clerk. The Special Inquiry Officer, after carefully considering all of the facts and circumstances in this case, has concluded that this is not the type of case in which the discretionary relief of voluntary departure should be granted, and his application for voluntary departure will be denied as a matter of administrative discretion. He is not eligible for any other type of discretionary relief from deportation.

He designated Switzerland as the country to which he desired to be deported if found subject to deportation and ordered deported from the United States.

FINDINGS OF FACT

Upon the basis of all of the evidence of record it is found:

(1) That the respondent is an alien, a native and citizen of Switzerland;

(2) That the respondent last entered the United States at San Ysidro, California, in August 1956;

(3) That the respondent was lawfully admitted for permanent residence at Rouses Point, New York, on October 9, 1952;

(4) That at the time of the respondent's last entry into the United States he was admitted to this country as a returning resident alien;

(5) That the respondent was convicted in the Superior Court in and for the County of Los Angeles, State of California, on March 9, 1956, for violation of Section 288a of the Penal Code of California, committed on or about February 16, 1956, and for which offense he was sentenced to pay a fine in the sum of $200 within one week or serve one day in the county jail for each five dollars of said fine not paid;

(6) That on June 18, 1959, the respondent was examined by a Senior Surgeon of the United States Public Health Service at Los Angeles, California, and certified by that officer as being afflicted with a Class A condition, "Psychopathic Personality," which condition existed prior to and at the time of his entry into the United States in August of 1956.

CONCLUSIONS OF LAW

On the basis of the foregoing findings of fact it is concluded:

(1) That under the provisions of Section 4 of the Act of September 3, 1954, the respondent was *not* inadmissible to the United States at the time of his last entry under the provisions of Section 212(a)(9) of the Immigration and Nationality Act because of a conviction of a misdemeanor which was classifiable as a petty offense under the provisions of Section 1(3) of Title 18, United States Code, by reason of the punishment actually imposed.

(2) That under the provisions of Section 241(a)(1) of the Immigration and Nationality Act the respondent is *not* subject to deportation on the ground that at the time of entry he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, aliens who have been convicted of a crime involving moral turpitude, under Section 212(a)(9) of the Act: Sex perversion;

(3) That under the provisions of Section 241(a)(1) of the Immigration and Nationality Act the respondent is subject to deportation on the ground that at the time of entry he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, aliens afflicted with Psychopathic Personality, under Section 212(a)(4) of the Act.

ORDER

It is ordered that the respondent be deported from the United States in the manner provided by law on the lodged charge only.

BERT F. KEARNEY,
Special Inquiry Officer.

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